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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 283

JOSEPH LASAGNA,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, TRUSTEES OF AND FOR THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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We believe there is no conflict in the evidence pertinent to any question now before this Court or in the applicable law. We do not believe that in petitioner's Statement of the Case or elsewhere in his brief the real nature of the case and its controlling facts are presented. Perhaps his misconceptions are explained by the emotion displayed in his brief.

(Unless otherwise indicated, the italics appearing in this brief are ours.)

Petitioner's Indictment of Utah Supreme Court

Before discussing matters here at issue we consider it our duty to call attention to some of the intemperate assertions appearing in petitioner's brief. Although we do not move to strike that brief or suggest that this Court do so of its own motion, we respectfully submit that such violent assertions are wholly unwarranted and have no proper place in the records of this or any court. Among those objectionable assertions are the following:

> On page 6 of the printed petition the granting of a writ of certiorari herein is said to be essential in order to determine the construction to be given to the Federal Employers' Liability Act "and *specifically* to determine whether or not the Utah Supreme Court will be permitted *to continue to construe and apply* the Federal Employers' Liability Act in a manner contrary to the decisions" of this and other Federal courts;
>
> On page 29 of petitioner's printed brief the Utah court is unmistakably charged with wilful misconduct in "using the simple *expedient*" and adopting the "*subterfuge*" there mentioned;
>
> In the first sentence under the title "Conclusion" on page 41 of said brief, petitioner again charges in substance that the rights of "railroad workers" are not protected and "the decisions of this Court" are not "respected and followed" in Utah as in other jurisdictions.

In support of his charge on said page 6 of his petition that the Utah court habitually violates its duty to follow the decisions of this Court petitioner cites the *Ehalt* and *Pauly* cases. There is certainly nothing in the case of *Ehalt* v. *McCarthy et al.*, 104 Utah 110, 138 P. (2d) 639, which in any degree tends to support petitioner's accusation. In *Pauly* v. *McCarthy et al.*, 166 P. (2d) 501 (erroneously cited on said page 6 as in 67 S. Ct. 102 instead of 67 S. Ct. 962), there was no written opinion by this Court, and we do not see how the order there entered can be here urged in support of the pending petition. Of the scores of cases decided by the

Utah court construing and applying the Federal Act, the judgment of that court has been reversed in one case only, to wit, the *Pauly* case.

A glance at the numerous cases arising under the Federal Act where the accident occurred and the plaintiff resided outside Utah and in which counsel for petitioner represented the plaintiff and saw fit to prosecute the suit in this State, causes one to wonder why he entertains such fear that the Utah court will not give plaintiffs in such cases a square deal.

All of the five members of the Utah court concurred in the decision under attack. If they are jointly and severally as ignorant and as derelict in their duty as claimed by petitioner, it is, of course, a grave misfortune. If any one of them has ever adopted "simple expedient" or indulged in "subterfuge" in order to reach a desired end or avoid his duty to "respect and follow" the decisions of this Court or if any one of them has ever violated his obligations as a judge, such wrongful act is not reflected in any Utah decision and is known to petitioner and his counsel alone.

The extravagant charges here made by petitioner do not overcome the presumption that the five members of the Utah court are competent lawyers and honest men. It would indeed be extraordinary if each of them should misinterpret the evidence and misapply the law as grievously as petitioner would have this Court believe. An examination of the real facts and pertinent law hereinafter cited will disclose that counsel for petitioner and not the Utah court has misconceived both the law and the facts and that no valid reason exists for requesting issuance of the writ prayed for.

Among the numerous decisions condemning accusations and inferences like those here contained in the petition and supporting brief are the following:

Supreme Council of the Royal Arcanum v. *Green*, 237 U. S. 531, at 546-7;

Keown v. *Hughes et al.*, 265 F. 572 (1st C. C. A.) at 575, 577-8;

Haley v. *Duquette et al.*, 13 Colo. 427, 59 P. 227; *In re Chartz*, 29 Nev. 110, 85 P. 352, at 357.

STATEMENT OF THE CASE

Throughout the trial the attorneys and witnesses referred to The Denver and Rio Grande Western Railroad Company as "Rio Grande" or "D. & R. G." and frequently identified defendants by such names. The Navy Supply Station where the accident occurred was referred to by attorneys and witnesses under that name or as "Navy Yard", "Naval Station", "Supply Depot", etc.

Facts Immediately Surrounding Accident

Petitioner's recital of the occurrences on the occasion of his accident appears on pages 10-11 of his brief. Many of the vital facts are not mentioned by him there or elsewhere.

Petitioner's witness Carl Bingham, a Government car inspector, testified, without contradiction, that the cars that collided with the string of cars then being inspected by petitioner and Ralph E. Olsen, a Government car inspector, were cut loose and permitted to thus collide by one of the Government's switching crews in charge of a Government engine and that at the time of the collision the "cars just hit and rolled a little ways and stopped" (R. 125). Respondents, their representatives or employees, had no more relationship with said engine or crew than did any stranger.

Petitioner accompanied Olsen to the cars inspected by him on the occasion of the accident at Olsen's request (R. 158). On that day Wikane made his first trip to the Station, inspected and noted on Exhibit 5 the numbers of the string of cars standing on Track 9, and observed blood on one of them and the condition of its welded coupler which Olsen had requested petitioner to look at immediately prior to the accident (R. 208-9). The uncontradicted evidence established and it was stipulated that each of said standing cars was a Union Pacific car, that is to say, a car that was to be taken out of the Station by the Union Pacific Railroad (R. 38-41). Track

9 was used for cars to be hauled out by that railroad (R. 149). There is no evidence in the record that the condition of those cars or any inspection or repair thereof was of any concern to respondents.

Petitioner was respondents' only employee or representative in the Navy Supply Station (hereinafter called "Station") while he worked there (R. 238; 98). He and his witnesses testified that during that period, including the day of the accident, no blue flags were used but at all times, except on the occasion of the accident, the lookout rule was followed. Under a later subtitle we shall discuss the matter of blue flags.

For a better understanding of the testimony and the unusual situation which made possible the adoption of the lookout rule, we refer to the testimony of Olsen (R. 73) and Bingham (R. 111-112; 136) that they were inexperienced and were directed to accompany railroad inspectors in order to learn how to perform such work. Thus an extra man was available for keeping a lookout while cars were being inspected or repaired. Inspectors for respondents and Station inspectors never attempted to direct or instruct each other (R. 185; 204).

Petitioner's witness Bingham testified that it was the uniform rule of the Station for at least one man to always keep a lookout when anyone was in a place where he might be injured if a car was moved and that practice was always followed while he worked with petitioner (R. 137-8). Petitioner's witness Olsen testified: that it was the uniform practice for one man to keep a lookout and that when two men were together both of them would never crawl under cars because there "had to be somebody at the lookout all the time;" that on all occasions prior to the accident one man maintained such a lookout (R. 92-3). Petitioner testified: that except on the occasion of the accident or when in the area where they knew that the cars "were protected by the warehouseman and we did not have to worry about anything," a lookout in a place where he could see and give warning of any approaching car or engine was always maintained when he was in a place of danger and that the occasion of the accident was the

only instance when that practice was not followed (R. 172); there were ladders on the side of the box-car then being inspected by him and by climbing onto the car one could have seen all over the yard (R. 169); by maintaining a lookout where approaching cars or engines could be seen, any possibility of accident to him would have been avoided (R. 181); and he guesses that Olsen while standing in the clear could just as well have told him what to look at without getting in between the cars with him (R. 173).

Of course the switch on Track 9 where the cars being inspected by petitioner were standing must have been lined for that track. Petitioner says that said switch was approximately 300 or 400 feet from the cars on which he was working (R. 170) but that he "never paid any attention to switches" (R. 171). His witness Olsen said that it was no part of their duty to turn switches but that there was "nothing to prevent it" (R. 95) and that with just a little movement they could have lined that switch so that an approaching car could not have gotten on to Track 9 at all (R. 95-6).

Petitioner's witness Bingham testified (R. 139) that he had told counsel for respondents in substance that he could not "conceive of any fact or reason of any kind or character that would connect the Denver & Rio Grande Western Railroad Company up with the happening of this accident to Mr. Lasagna" and further testified (R. 140-141) that it was too deep for him to figure out how anything done or omitted by the D. & R. G. could have been the cause of the accident.

Employment of Petitioner

Petitioner sought recovery in this suit under the Federal Employers' Liability Act and not otherwise. The allegations contained in paragraphs 4 and 5 of his complaint are the allegations upon which his right to sue under that Act must rest. Said paragraph 4 reads as follows:

> 4. That on or about July 25, 1944, and for several months prior thereto, plaintiff was in the employ of defendants, the said trustees, as an inspector to inspect and repair railroad cars *which were used, oper-*

> *ated and controlled by them* in carrying on *their* said interstate commerce business, and that the said plaintiff, so employed by them in making *such* inspections and repairs, likewise was engaged in interstate commerce (R. 2).

In said paragraph 5, immediately following the above quoted language and definitely tied to it (R. 2), petitioner alleges: "That in the course of *said* employment of the said plaintiff and in making *such inspections and repairs*, it then and there became, and it was, the duty of the said defendants to furnish and provide plaintiff a reasonably safe place in which to make *such inspections and repairs*," and to promulgate and enforce rules and regulations "by requiring flag warnings or other warning signals" for the protection of petitioner and other employees of respondents, but that respondents failed to perform those duties.

It will be observed that allegations in subsequent paragraphs of the complaint that petitioner at times inspected Union Pacific cars and worked with Union Pacific and Naval Station inspectors are merely allegations of a *practice* and do not amend or modify said allegations of paragraphs 4 and 5, which clearly and unmistakably define and limit the nature and scope of petitioner's employment.

On page 9 of the brief of petitioner, following his recital of the allegations of the complaint with respect to the duty of respondents to furnish him with a safe place of work and to promulgate and enforce proper rules, appears an utterly erroneous statement of alleged admissions of those recitals in respondents' answer. A reading of paragraph 3 of the answer at the page cited by petitioner (R. 11) will disclose that respondents there merely admit, as they freely admit here, that when (as alleged in paragraph 5 of the complaint (R. 2) to which said paragraph 3 of the answer was directed) switching operations are carried on by respondents "in yards or other places maintained or controlled" by them they owe employees there at work the duty of furnishing a reasonably safe place of work and also the duty of establishing, promulgating and exercising due care for the enforcement of proper

rules. All allegations of the complaint not expressly admitted are denied in paragraph 7 of the answer (R. 13).

In their answer (R. 10) respondents admit said allegation that petitioner was employed by them "as an inspector to inspect and repair railroad cars which were used, operated and controlled by them in carrying on their said interstate commerce business" and that *while thus working* he and respondents were engaged in interstate commerce, but deny (R. 13, paragraph 7) any allegation that when he met with his accident he was performing work for respondents or that they were guilty of any claimed negligence.

Car foreman Ellis V. Carlson, called as a witness by petitioner, testified without contradiction that after the Station began operations in June, 1943, until the year 1945, Roseberry was car inspector for respondents at the Station except during brief periods when he was relieved by Kennedy and petitioner, respectively (R. 46). He further testified (R. 48) that said inspectors were not to inspect and repair any cars that were not to be moved by respondents.

As stated on page 8 of petitioner's brief, he was a first class carman, with seventeen years of experience when he began work at the Station. The duties of that job consisted of inspecting and repairing cars (R. 159). His first employment at the Station was for approximately one month, beginning on March 13, 1944 (R. 143). His other employment there began on July 20, 1944, and with the exception of July 22 he continued to work there until his accident on July 25, 1944 (R. 156-7). *The only occasion when he had any conversation with and received directions from respondents or any officer, agent or employee of respondents concerning the Station and the work to be there performed by him* was that referred to on page 12 of his brief. At the pages there indicated (R. 143-4) he says that Assistant Car Foreman Wikane then told him that he (Wikane) had never been in the Station, that a U. P. and Navy man were working there, to ask them "what there is to do" and "they would show me." Wikane says (R. 206) that what he then said was that petitioner "would be told when he arrived there what tracks were designated for receiving and delivering Rio Grande cars."

If there is any real difference between petitioner's and Wikane's versions of this conversation, it was of course the sole province of the jury to decide which was correct. But nothing was there said and nothing appears elsewhere in the record either expressly or impliedly indicating that this experienced carman, who thoroughly knew his business and required no instruction (R. 206), was authorized, directed or permitted by respondents to violate rules promulgated by them for his protection and well known to him or to otherwise evade the responsibilities of his vocation.

Petitioner's testimony (R. 144-5) makes clear his full knowledge of the difficulties incident to gaining entrance to the Station and the fact that it was under military control. That testimony, including Wikane's statement to petitioner that he had never been in the Station and had no knowledge concerning it, refutes any possible assumption by petitioner that Wikane or the Trustees had any knowledge or were proferring any assurances with respect to the Station or operations there conducted. Except in his complaint petitioner has never claimed that he indulged in any such assumption. The uncontradicted evidence hereinafter cited establishes that at all times while petitioner was employed at the Station he had full notice and actual knowledge concerning all operations, practices and conditions therein which in any manner related to his work or contributed to his accident and that respondents, their officers, agents or employees or any of them other than petitioner had no notice or knowledge thereof. *With such complete information and well knowing that he was the only representative of respondents on the ground, petitioner elected to remain silent.*

Supervision and Control

As alleged in the complaint (R. 2-3) and admitted in the answer (R. 12), said Station was built and operated by the Federal Government. Within the Station the Government maintained and operated an extensive railroad yard, with tracks indicated on plaintiff's (petitioner's) Exhibit A, a copy of which appears following page 246 of the printed record. Respondents had no supervision or control or right

of supervision or control over the Government's engines, switching crews or other employees in the Station or over the tracks, structures, or other property there maintained by the Government. As alleged in paragraph 7 (R. 3-4) and paragraph 9 (R. 5) of the complaint and established as matter of law by uncontradicted testimony and the admissions in paragraphs 4 and 5 of the answer (R. 12-13), petitioner was employed and paid by respondents, was not subject to the direction, order, control or management of anyone else, and respondents had no direction, control or supervision over any employee of the Government or of the Union Pacific Railroad Company.

Petitioner's witness Carl Bingham, employed by the Government as a car inspector (R. 112), testified without contradiction (R. 138): that the Station was enclosed by a fence eight or nine feet high, inside which was a highway patrolled by armed guards, whose duty it was to see that no one entered without proper credentials, and even if his credentials were accepted and he was permitted to enter, he would be accompanied by an armed guard during all of the time he remained inside. Petitioner's witness Ralph E. Olsen, also employed as a car inspector by the Government (R. 49), testified without contradiction: that the Station was under strict Army discipline and, so far as he observed, that dicipline was never relaxed; that anybody outside, even the Governor of the State or the General Superintendent of respondents or of the Union Pacific Railroad Company could not have gained entrance to the enclosure surrounding the Station without showing their credentials and obtaining permission to enter (R. 99); and that to his knowledge the only people in the world who had any control, supervision or power of control or supervision over operations in the Station, including switching operations, were the Government officers in charge (R. 98).

The first paragraph of the trial court's instruction to the jury No. 6 was as follows:

> "You are instructed that no evidence has been introduced in this case sufficient to sustain or justify a finding by you that defendants had any power or

> authority to supervise, direct or control any engine, switching crew or employee of the Government Agency operating the Navy Yard or to make or enforce any rules or regulations or to control or change any practices of any employee or employees of the Government Agency in charge of the Navy yard" (R. 18).

Since petitioner filed no cross-assignment of error in the Utah Supreme Court directed to the above quoted instruction, it would not be subject to attack even had its accuracy not been conclusively established by the uncontradicted evidence, including that above cited.

Concerning Blue Flag Rules

At page 9 of his brief, petitioner identifies the negligence upon which he relies as a failure of respondents "to use and exercise reasonable care in furnishing him with a safe place to work, in that they commanded him to perform the duties of his employment as car inspector in yards where the inspectors were not protected by safety rules, regulations or devices."

Since there is not a scintilla of evidence in the record suggesting the existence of any defect or unsafe condition of the Station premises or of any tracks, buildings or other property located thereon or of any tools, machinery, equipment or other thing furnished to or used by petitioner, we do not see how the doctrine of "safe place" could be here involved. In our Argument we shall again make brief reference to this matter.

In charging negligence with respect to safety rules, the only rules specifically mentioned in the complaint are "flag warnings or other warning signals to be attached to or placed on cars" (R. 2). When Circular No. 100 was promulgated, petitioner received and acknowledged in writing his receipt of it (R. 161). When a copy of respondents' safety rules was shown to petitioner, containing Rule 26, he said (R. 162), "I know what is in it. I don't have to read this." Both said circular marked Exhibit 3 (R. 247-8) and said Rule 26 (R.

126) were received in evidence without objection (R. 126). By those rules inspectors and other employees working in, on, under or about an engine, car or train are required to protect themselves against movement of such equipment by displaying blue signals as therein specified. Petitioner testified that he was thoroughly familiar with those rules (R. 160) and that when inspecting or repairing cars on the D. & R. G. lines he would uniformly get a blue signal and protect himself in that way (R. 163) and knew that it was up to him to thus protect himself (R. 164). He further testified (R. 166; 177) that he did not ask for blue flags but just went and got them when he needed them. His only explanation of why he did not procure a blue flag when working at the Station was that he didn't think he could bring anything with him through the gate to the Station, that he "never bothered", and did not try or make any effort to bring in a blue flag and use it (R. 167).

No evidence was introduced which proved or tended to prove that either of said rules had ever been abrogated or that respondents ever had any notice or knowledge that they were not being obeyed by petitioner.

None of the three men employed by respondents to work in the Station was ever there while either of the other two was there. As already indicated, petitioner or Kennedy only went there to perform Roseberry's work as carman while he was off duty. Petitioner testified that during his employment in the station he never saw Roseberry (R. 156) and that he (petitioner) was "the only Rio Grande man out there" (R. 238).

Neither the evidence nor petitioner's brief contains any suggestion as to what could have been done by respondents with respect to their blue flag rules that was not done. Those rules have never been abrogated. At the pages above cited petitioner himself testified that they were duly promulgated, well known to him, and during the years of his service as carman for respondents had been uniformly obeyed by him. If it was respendents' duty to gain access to the Station premises and learn whether or not their blue flag rules were

being enforced, what representative more competent than petitioner could have been selected for that purpose? His unusual qualifications are stressed in his brief and established by the uncontradicted evidence. Were respondents negligent in failing to employ one or more additional men to shadow petitioner, learn whether or not he was obeying the rules, and file a report of their investigations? Pursuant to what principle of justice, law or logic could petitioner fail to notify respondents concerning any hazardous practices or conditions unknown to them but fully known and appreciated by him, their sole representative on the ground, and then complain because they did not correct those conditions? If they did not have the right to look to him for such information, including notice of his failure to follow their blue flag rules, to what source was it their duty to look? With respect to the alleged waiver of the blue flag rules, the Utah court aptly says (R. 265):

> "It would be strange, indeed, to hold that the master was liable because the servant had himself violated a rule, and that therefore the master had waived it."

Was Petitioner Injured While Performing His Duties?

At page 8 of his brief petitioner says that he "was injured in the performance of his duties under his employment." Were it not for the statements of the Utah court next below cited, we would not hesitate to say that the record discloses nothing in support of a claim that petitioner was acting within the scope of his employment when injured. In its opinion (R. 253) that court says that although "normally" cars to be taken out by Union Pacific were placed on Tracks 9 and 10, "there were exceptions to this rule, and according to respondent's (petitioner's) testimony he had no knowledge as to the destination of the cars *since this was a military secret.*" Later referring to respondents' contention that petitioner was outside the scope of his employment when injured, the Utah court says: "The facts and circumstances shown by the record indicate otherwise. *However, it is not believed a discussion of this point is necessary to a proper solution of the case.*"

It is true that petitioner and his witnesses testified that at times errors were made in switching operations and cars that were not to be taken out by Union Pacific were placed on Tracks 9 or 10 assigned to that railroad instead of on Tracks 11 and 12 assigned to respondents. It is also true that in answer to one question petitioner said that the destination of cars "was a military secret." If petitioner had been generally employed to inspect and repair cars in the Station with no means of knowing which of them were to be handled by his employers and which by Union Pacific, he could not be censored for being unable to tell them apart and would not be outside the scope of his employment in inspecting or repairing any cars he found there. But regardless of whether the "destination" of cars in the Station was a military secret, the matter of which railroad was to haul them from the Station and would be responsible for their condition was not a military or other kind of secret. It was a fact necessarily made known to each railroad before transportation from the Station began.

Olsen says (R. 80) that if petitioner was there on the job when Rio Grande trains came into the Station, petitioner would inspect those trains. Petitioner testified (R. 237-8) that he was required to wait around for incoming Rio Grande cars and if he had to wait an hour and a half for an incoming Rio Grande train after his eight hour shift, he would charge overtime for that waiting period. Manifestly there could have been no uncertainty in his mind as to the identity of the incoming cars that it was his duty as carman to inspect and repair.

With respect to cars that were to be taken out of the Station, petitioner testified (R. 242): that the train control office in the Station had a list of all cars and where they were to go and who had to take them out; that after he had inspected a car he would then go to the train control office and learn whether it was to be taken out by Union Pacific or respondents. Similiar testimony appears on other pages of the record, including his statement (R. 230) that he would know what cars were to be handled by respondents if they were on Tracks 11 and 12 or if he was so informed by the train control office. That information was as readily available to

him before as after he inspected or repaired cars. *He gave no reason for or explanation of his failure to learn from the train control office, before inspecting or repairing cars, the identity of those for which respondents would be responsible.*

Petitioner and his witnesses testified that they all worked together in the Station. Olsen's testimony (R. 108-110) indicates that their sole reason for doing so was a friendly and wholly voluntary co-operation between them and a thought that they might thus facilitate the work. *There is not a scintilla of evidence in the record that knowledge or notice of such practice was ever communicated to respondents.*

If petitioner's version of his conversation with Wikane when he began work at the Station is fully accepted, we respectfully submit that he had no right to assume or act on the assumption that he was to work for Union Pacific or inspect or repair any cars except those of concern to his employers. For years he had been a D. & R. G. carman and he knew that he was going to the Station to relieve another D. & R. G. carman. He had no more right to assume that it would be his duty to inspect and repair Union Pacific cars than to cook or wash dishes for the Government.

Manifestly Wikane had no express or implied authority to consummate what would have been in substance and effect a joint terminal agreement between the railroads. If he had authority to employ petitioner to inspect and repair Union Pacific cars, the results of such employment might be very far-reaching and involve vast liabilities to Union Pacific, its employees, and others who might suffer damage if petitioner should be negligent in his work. Wikane testified without contradiction (R. 207-8): that such operations have never been entered into by railroads without carefully drawn contracts allocating costs of both material and labor and safeguarding the rights of the parties; that the Superintendent of the railroad would have no right or authority to enter into any such arrangement, and no such contract could be consummated without the approval of the Federal Judge before whom the bankruptcy proceedings were then pending.

We respectfully submit that petitioner's work cards, in his own handwriting and introduced in evidence as Exhibit

No. 6, conclusively prove that he knew that he was not performing any service for which he was employed while inspecting or repairing cars for Union Pacific. He testified: that it was his duty to prepare and file a card showing his work on each day and that he performed that duty (R. 217); that he endeavored to report faithfully each day's work on the cards included in said Exhibit 6 (R. 218); that every one of the cars designated on Exhibit 6 and on the carbon copies of those cards produced by him and marked Exhibit 7 was a car handled by D. & R. G. (R. 221); that he did not make any report on any work he did for Union Pacific because he knew it was none of the business of and of no concern to respondents, and he made no report of his work to Union Pacific because he was not working for that company (R. 223). It is uncontradicted that petitioner's work cards furnished the sole information on which his compensation was computed, that respondents had no means of checking their accuracy, and had they received any notice or knowledge that any part of the time for which petitioner was charging had been employed in other work than the repair and inspection of D. & R. G. cars, compensation would have been confined to the time spent on D. & R. G. work and the performance of any work by petitioner for Union Pacific or for anyone except respondents would have been stopped. (See Wikane's testimony, R. 243-4, and petitioner's at R. 238 and other pages earlier cited herein.)

Confessedly petitioner while inspecting or repairing Union Pacific cars was not engaged in inspecting or repairing respondents' "railroad cars which were used, operated and controlled by them in carrying on their said interstate commerce business" as alleged in paragraphs 4 and 5 of his complaint earlier discussed in this brief.

ARGUMENT

It seems to us that petitioner has been excessively prolific in his citation of authorities announcing the elementary law: (a) that a valid judgment entered on a verdict "supported by substantial evidence" should not be reversed and the suit

dismissed by an appellate court; (b) that it is the province of the jury to pass on conflicting evidence as to material facts; and (c) that in cases arising under the Federal Employers Liability Act, State courts have no right to construe and apply that Act "in a manner contrary to the decisions of the United States Supreme Court." If any authority in support of any one of said propositions were required, a single citation would certainly have sufficed and a substantial amount of printing would thereby have been saved.

Although we believe our reference to the grave error of petitioner on page 9 of his brief with respect to admissions contained in respondents' answer and our recital of the controlling facts of the case make unnecessary any further argument or any citation of authority by us, we shall briefly discuss some of petitioner's contentions.

Safe Place

On page 37 of the brief filed by him in the Utah Supreme Court, petitioner cited in support of his contentions relative to "safe place" the annotation in 27 Ann. Cas. 1913-B, 797, to the case of *Wilson* v. *Valley Improvement Company*, 69 W. Va. 778, 73 S. E. 64, and there also cited the report of said case in 45 L. R. A. (N. S.) 271. In the first paragraph of said annotation the editor says that the rule requiring the employer to provide his employee with safe appliances and a reasonably safe place to work "is based on the possession, use and control by the master of the appliances used and the premises where the servant's work is performed, and is not ordinarily applicable to cases where the appliances used or the premises where the employee's services are performed are owned and controlled by a third person." So far as we are aware the statement of the general rule just quoted is well-settled law in all jurisdictions.

Ellis v. *Union Pac. R. Co.*, 67 S. Ct. 598, is an apt illustration of an exception to this general rule. There the plaintiff was injured when caught and pinned against the wall of a building adjacent to the railroad track along which the car he was riding was traveling. There was a curve in the track

which made the situation "deceptive because the overhang of the car on the curve and its tilt toward the building resulting from a higher outside rail, reduced clearance materially." Plaintiff was "unfamiliar with the area and its hazards." There was a warning sign but he did not see it and "no effort was made to warn him personally," although the engineer on the train "was an experienced railroad worker thoroughly familiar with this particular spur" and rested under the duty to watch plaintiff "continuously or stop the engine." The railroad company did not build, maintain or have control over the adjacent building, but this Court held the matter of negligence in failing to warn to be a question of fact for the jury.

In said 45 L. R. A. (N. S.) cited by petitioner in the Utah court, the editor says at page 272:

> "Of course, it could not be contended that the master would be liable for injuries to his servants caused by the sporadic negligence of servants of a third person upon other premises."

The only possible exception to the last quoted statement of well-settled law would be where the employer had notice of dangerous operations or practices and failed to warn the employee. When the complaint herein was drafted, petitioner's able counsel fully recognized the law to be as just quoted. This is evidenced by the allegations of the complaint (R. 5-6) that respondents had full notice and knowledge of the alleged unsafe condition of petitioner's place of work and of the alleged negligent practices there followed, that they failed to warn petitioner of said dangers, and that petitioner "had neither notice nor any knowledge whatever, until after the happening of the accident as hereinafter alleged, nor any knowledge of the conditions and circumstances of any unsafe condition of the premises." *There was a complete failure of proof of any of the allegations just referred to, and, as hereinbefore indicated, the uncontradicted evidence establishes that petitioner had full knowledge concerning conditions and practices in the station and remained silent.*

In *Missouri Pac. R. Co.* v. *Aeby*, 275 U. S. 426, 48 S. Ct. 177, where plaintiff brought suit under the Federal Act, the

court at page 179 of the Supreme Court Reporter thus disposes of her contention that she should have been warned of an alleged dangerous condition:

> "Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning."

We respectfully submit that cases like the *Ellis* case, *supra*, or *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, where there was substantial evidence that the intestate was killed when struck by a mail hook negligently permitted to protrude from the train, or the *Tiller* decisions, 318 U. S. 54, 63 S. Ct. 444; 323 U. S. 574, 65 S. Ct. 421, where the jury found on evidence held to be substantial that the death of the intestate was occasioned by defendant's violation of its duty to warn, have no more pertinency in the case at bar than decisions construing the income tax law. As conclusively appears from our review of the pleadings and evidence, *supra*, petitioner was respondents' only representative at the Station. He had actual knowledge of all conditions and practices there and respondents had none. They cannot be charged with negligence for failure to warn him of something they knew nothing about and concerning which he had full and exclusive information.

Not a single case cited by petitioner is remotely in point here. A sufficient answer to all of his cases dealing with the doctrine of "safe place" would be that such doctrine is not involved here.

In *Pierson* v. *Chicago etc. Ry. Co.*, 170 F. 271 (8th C. C. A.), plaintiff had been employed by defendant as a boiler maker's helper and worked in a roundhouse on defendant's own premises to which an addition was being built by an independent contractor. As plaintiff in the course of his employment was entering defendant's roundhouse where he was employed, a brick was swept from the roof by an employee of the independent contractor engaged in constructing the addition, which brick struck plaintiff and occasioned the injuries complained of. In denying liability the court quotes with full

approval various excerpts from decided cases and Thompson on Negligence. In harmony with the editor's statement in 45 L. R. A. (N. S.) 272 above quoted, the court says at page 275:

> "Here the place furnished the plaintiff for the performance of his work was in itself no way dangerous, and the defendant had no occasion to anticipate that the servants of the contractor, over whom it had no control whatever, would sweep bricks from the roof and thereby cause injury to the plaintiff.
>
> "The conclusion reached is that the record fails to show actionable negligence, or any negligence, upon the part of the defendant, and the judgment of the Circuit Court is affirmed."

If any negligence other than petitioner's was a proximate cause of his injuries, such other negligence could only have been "the sporadic negligence of servants of a third person upon other premises." We respectfully submit that petitioner's witness Bingham, who saw the accident, cannot be charged with mental incompetence for saying that it was too deep for him to figure out how anything done or omitted by respondents could have been the cause of the accident.

Federal Act Is Not Applicable

Two conditions precedent are essential to a holding that petitioner was acting within the scope of his employment when injured: (1) that Assistant Car Foreman Wikane had authority to hire petitioner to inspect and repair Union Pacific cars, thus initiating a joint operation without the knowledge or consent of respondents *and without the knowledge or consent of Union Pacific;* and (2) that what petitioner testified Wikane told him was a direction or could properly be construed by petitioner as a direction to do such work for Union Pacific if whoever he happened to meet at the Station should tell him to do so.

In Vol. 2 of Roberts Federal Liabilities of Carriers (2d Ed.), at page 1388, the author states that "it is an essential prerequisite to liability" of the employer under the Federal

Act that the employee be acting within the scope of his employment when injured. Among the numerous cases cited by Mr. Roberts in support of his text is *Byram* v. *Illinois Central R. Co.*, 172 Iowa 631, 154 N. W. 1006, where suit was brought under the Federal Act. At page 1008 of 154 N. W. the Iowa court says that to come within the Act plaintiff must have received his injuries "while in the course of his employment. If he voluntarily undertakes the performance of a duty for which he was not employed, he acts at his own peril, and does not come within the terms of the act." We have found no decision at variance with this statement of the law. We know of no workmen's compensation act that would impose liability *on respondents* under facts like those in the case at bar. In this connection the decision of the Utah court in *Utah Copper Company* v. *Industrial Commission et al.*, 62 Utah 33, 217 P. 1105, is pertinent.

Petitioner's Violation of Rules Bars Recovery

In 35 Am. Jur., after saying that recovery by an employee may not be barred where he fails to follow a safety rule in obedience to an order of a superior having authority to make such order, the editor adds at page 705:

> "* * * of course, it must be made to appear that authority to waive observance of the rule was vested in the person whose order the employee obeyed."

Since nothing was ever said to petitioner by Wikane or any other representative of respondents intimating that the blue flag rules should not be followed, no question of "waiver" is here presented. Certainly petitioner had no right or authority to waive or otherwise abrogate them. Among the many decisions of this Court holding that it was his personal duty to obey safety rules and that his violation of those rules absolutely bars recovery here are the following:

> *Davis, Agent* v. *Kennedy*, 266 U. S. 147, 45 S. Ct. 33;
>
> *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139, 49 S. Ct. 91;

Southern Ry. Co. v. *Youngblood*, 286 U. S. 313, 52 S. Ct. 518.

The only possible reason for typing or printing a rule is to impart notice and knowledge to employees affected thereby of the identity and nature of safety practices under which they will work. If they otherwise become informed of those practices, it adds nothing to type or print them on a sheet of paper. We know of no decision contrary to that of the Oregon court in *Jodoin* v. *Luckenbach S. S. Co.*, 125 Ore. 634, 268 P. 51, and cases there cited, wherein it is held "that it is unnecessary to post, promulgate, or otherwise announce a rule or regulation to be effective, if it is understood and observed by the persons to whom it applies so as to have become a custom."

When petitioner sets forth on said page 9 of his brief the negligence of respondents upon which he relies, he designates it as a failure to furnish him "with a safe place to work, *in that* they commanded him to perform the duties of his employment" without safety rules, regulations or devices. Thus he unwittingly makes clear the indisputable fact that the character or condition of the premises, tools or other equipment had nothing to do with his accident and that the doctrine of "safe place" and his numerous citations involving that doctrine are not pertinent here. By compulsion he resorts to his contention with respect to safety rules, and his whole case is there rested. On page 14 of his brief he says: "The enforcement of the blue flag rule would undoubtedly have saved petitioner from injury." Who except himself could have accomplished that salvation? What agent or representative of respondent, other than himself, had opportunity to follow or enforce the lookout rule?

There is no evidence as to what if anything respondents would have said or done had petitioner informed them that he was not using blue flags as required under their rules but was following the lookout rule. However, it is obvious that the lookout rule is a much safer rule. A comparatively small blue flag may be and often is not seen by the crew of approaching cars or engines, whereas a lookout watching for approaching cars or engines could not well fail to see objects of that size. Nothing in the record indicates that the lookout rule did not

meet all requirements of due care. Petitioner's testimony that had it been obeyed any possibility of accident would have been avoided is ample proof of its sufficiency. The fact that Olsen and Bingham were in the habit of following petitioner around in order to learn the business, thus having an extra man who could keep watch, is doubtless responsible for the adoption of the lookout rule. We know of no other railroad yard in the United States where such a situation existed or where any rule was or is generally followed affording as much protection to carmen working in or under cars as did the lookout rule when obeyed. In this connection we invite attention to *Stone* v. *Railroad*, 35 Utah 305, at 321-2; 100 P. 362. Had petitioner seen fit to inform respondents of the practice he was following, even were it assumed that they had power to dictate to the Government what practices should be employed it is probable that they would have given their full approval to substitution of the lookout rule for their blue flag rules.

By his voluntary act in going between the cars when he knew that no lookout was being maintained as required under the lookout rule theretofore uniformly obeyed by him and when, as he testified, all possibility of accident would have been avoided had such lookout been maintained, petitioner forfeited any right of recovery under any law ever announced by this or any court. On page 14 of his brief he says that compliance with the blue flag rule would have prevented the accident. His admitted violation of that rule is also a complete bar to any right of recovery by him.

Respondents Were Not Negligent and No Act or Omission By Them Was a Proximate Cause of the Accident

In *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232, this Court says at the Supreme Court Reporter pages below indicated:

> "* * * The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. (Cases cited.) When the evidence is such that without

weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. (p. 234.)

"* * * The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. (p. 236.)

"* * * Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. (p. 236.)

"* * * The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events." (pp. 236-7.)

We have already quoted Instruction No. 6 (R. 18) given by the trial court, wherein the jury was charged as matter of law that no evidence was introduced sufficient to sustain or justify a finding by them that respondents had any power or authority to supervise, direct or control any engine, switching crew, or employee of the Government, or to make or enforce any rules or regulations or control or change any practices in the Station of any employee or employees of the Government. Entirely aside from the fact that said instruction is a plain statement of the truth as conclusively appears from the record, its accuracy cannot be now questioned. Petitioner did not assign in the Utah Supreme Court any cross-error complaining of this instruction. That court has unquestioned power to establish rules of practice and procedure to be there followed. Among the later cases announcing its well-settled rule that action in the trial court will not be reviewed unless assigned as error and that a respondent cannot attack a ruling of the trial court without assigning a cross-error directed to that ruling, are the following:

Wilcox v. *Cloward et al.*, 88 Utah 503, 56 P. (2d) at (11) page 9;

Garrison v. *Davis et al.*, 88 Utah 358, 54 P. (2d) 439, at 444;

Steele v. *New York Life Ins. Co.*, 87 Utah 63, 48 P. (2d) 436.

Said rule of practice in the Utah court is grounded upon the same considerations that induced the rule in Federal courts which forbids attack by appellee on rulings of the lower court in the absence of a cross-appeal.

See: *United States* v. *Ten Cases, etc.*, 49 F. (2d) 87 (8th C. C. A.), at page 89, and numerous decisions of other Circuit Courts of Appeal and of the United States Supreme Court there cited.

Flourney v. *Wiener*, 321 U. S. 253, 64 S. Ct. 548.

Surely respondents cannot be guilty of negligence for failing to do what they had "no power or authority" to do. But were the absurd assumption indulged that they were more powerful than the United States Government and could have gained entrance to the Station and compelled the Navy officers there in charge to do their bidding, any obligation to attempt such feat could not arise before they were apprised of its necessity. Until their sole representative on the ground, to wit, petitioner, saw fit to convey to them his knowledge concerning conditions or practices in the Station, they had the right to presume that he and other persons working there were performing their duty and exercising due care.

See *Lawrence* v. *Bartling & Dull Co.*, 255 Mich. 580, 238 N. W. 180, at 181.

During the period in question the late war was on. It is alleged in paragraph 7 of the complaint (R. 3) that respondends rested under the duty "to inspect engines and cars" in the Station and see that they were in proper condition to transport war munitions, etc. The allegation of such duty negatives any inference that its performance constituted negligence. A

failure or refusal to perform that duty in wartime would have been not only wrongful but fraught with serious consequences to them. In employing petitioner as their carman at the Station, they had the right to presume that he would not be exposed to danger arising from negligence or other wrongful act of the Government or its employees. They were not negligent in failing to anticipate any of the occurrences incident to the accident, including the conduct of Olsen and the Government's switching crew or the gross negligence of petitioner himself.

In *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, Mr. Justice Holmes, at page 6 of the Northeastern report, thus states what we contend to be elementary law:

> "Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts any more than a particular act by this or that individual."

Even if the utterly false assumption could be indulged that something in the record indicates that Wikane was negligent in March, 1944, when the only conversation concerning petitioner's work at the Station occurred, that negligence was completely insulated long prior to the happening of the accident; it was certainly not "a link in an unbroken chain of reasonably foreseeable events" as required by the decision of this Court in the *Brady* case, *supra.*

We believe the opinion of the Utah court (R. 252-266) touching the subject-matter of this subtitle is unanswerable and shall not lengthen this brief by quoting that court's observations and conclusions.

CONCLUSION

Manifestly the Utah court did not here decide "*a federal question of substance*" contrary to any applicable decisions of this Court and there are not "special and important reasons" for issuing the writ prayed for, as required under Rule 5, 5(a)

of this Court. If this Court will review decisions of State courts in suits brought under the Federal Employers' Liability Act merely because of claimed errors of the type here assigned, aggrieved plaintiffs and defendants in such cases will occupy the entire time and attention of this Court.

It seems to us clear that *legal* responsibility for this accident does not rest on respondents or on Union Pacific, whose cars petitioner was inspecting. We doubt that the Government, whose employee requested petitioner to perform that work and whose switching crew and car inspector were actors in the occurrences which occasioned the accident, is *legally* responsible. If there is any *moral* responsibility, it clearly rests on the United States Government. Application for relief should be addressed to Congress and not to the courts.

We earnestly contend that the writ prayed for should not be issued.

Respectfully submitted,

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